Supreme Court, U. S.
FILED
APR 2 1977
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. [redacted] 76-255

HAZELWOOD SCHOOL DISTRICT. et al.,

Petitioners,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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IN THE

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No. 76-225

HAZELWOOD SCHOOL DISTRICT. et al.,

Petitioners,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

Interest of *Amicus*

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation established under the laws of the State of New York. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to Negroes suffering injustice by reason of racial discrimination. For many years attorneys of the Legal Defense Fund have repre-

sented parties in employment discrimination litigation before this Court and the lower courts. The Legal Defense Fund believes that its experience in employment discrimination litigation may be of assistance to the Court.[1]

I.

Introduction

This action presents a classic case in which *de jure* segregation of public school faculties has been perpetuated in operation by purposeful discrimination in hiring. Prior to 1954 the Missouri Constitution required that separate schools be maintained for black and white children. Mo. Constn. Art. IX, § 1(a). In Missouri, as elsewhere, this requirement meant both that black students could only attend schools with other black students, and that black teachers and other faculty could only teach at all black schools.

St. Louis County, with a population of about 1.5 million, and covering an area approximately the size of Montgomery County, Maryland, is divided into 25 school districts.[2] Prior to this Court's decision in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), only two of the school districts operated black schools—St. Louis City and Kinloch. Black children in other districts were obligated to travel to one of these districts if they wished to attend school.[3] Under the state constitution black teachers, no matter how qualified, could only teach in these 2 districts. For a black teacher seeking employment in St. Louis County the Missouri constitution operated as a state mandated faculty assignment rule.

Although *Brown* was decided in 1954, the provision of the Missouri Constitution prohibiting the hiring of black faculty at white schools, and thus at 23 of the 25 districts in St. Louis County, was not repealed until 1976. Mo. Constn. Art. IX, § 1 (Cumulative Pocket Part, 1977). As late as 1968-69 10 of these 23 districts, with a combined faculty of over 4,000, still employed no black teachers.[4] As of 1972-73 there were still 5 districts with no black teachers, another 6 districts with less than 1% black teachers, and another 4 with under 2% blacks. Outside of St. Louis City about half of all black teachers were concentrated in 3 districts with only 5% of the total county teachers, Kinloch, Wellston and University City, with a combined faculty 45.3% black, while the remaining districts were 3.0% black. If St. Louis City is included the disparity is even greater.

The proportion of blacks on the faculty of each school district corresponded with the district's black student enrollment with almost mathematical precision.

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[1] Letters of consent to the filing of this brief have been filed with the Clerk.

[2] The exact number of districts has varied over the last 20 years as districts have merged or divided.

[3] See *United States* v. *State of Missouri,* 363 F.Supp. 739, 743 (E.D. Mo. 1973), aff'd 515 F.2d 1365 (8th Cir. 1975).

[4] The districts were Afton, Bayless, Brentwood, Hazelwood, Hancock, Jennings, LaDue, Mehville, Parkway and Riverview Gardens. See p. 4-5 infra. The total faculty of each district is set out in Plaintiff's Exhibit No. 54.

Students and Faculty; St. Louis County
1972-73[5]

District	*Percent of Faculty Non-White*	*Percent of Students Non-White*
Kinloch	88.2%	100.0%
Wellston[6]	79.8%	96.8%
St. Louis City	54.4%	68.8%
University City[6]	26.6%	54.9%
Normandy[6]	13.3%	45.9%
Webster	11.7%	16.0%
Maplewood[6]	10.4%	16.9%
Berkeley	8.0%	25.7%
Special School District of St. Louis County	7.7%	18.9%
Kickwood	7.2%	12.4%
Ritenour	5.6%	6.9%
Valley Park	1.6%	1.7%
Ferguson	1.4%	2.2%
Brentwood[7]	1.1%	10.1%
Hazelwood[8]	1.0%	2.3%
Jennings[6,7]	0.6%	3.6%
Parkway[7]	0.09%	0.2%
LaDue[7]	0.05%	1.3%
Pattonville	0.05%	0.9%
Lindbergh	0.04%	0.3%
Rockwood	0.02%	1.0%
Riverview Gardens[6]	0	1.6%

[5] Plaintiff's Exhibit 54; Department of Health, Education and Welfare, Directory of Public Elementary and Secondary Schools in Selected Districts, Fall 1972, pp. 746-785 (1972).

[6] These districts are contiguous with St. Louis City.

[7] These districts had no black faculty in the fall of 1970. Department of Health, Education and Welfare, Directory of Public Elementary and Secondary Schools in Selected Districts, Fall 1970, pp. 779-818 (1970).

District	*Percent of Faculty Non-White*	*Percent of Students Non-White*
Hancock[6]	0	0.1%
Afton[6]	0	0
Bayless[6]	0	0
Melville	0	0

The racially identifiable school faculties established by law prior to 1954 have thus continued, although now in a more elaborate version indicating not only the presence of black students but also their proportion of the school population. In addition to the two districts with black schools and teachers prior to *Brown*, blacks have been hired in districts to which substantial numbers of blacks moved since 1954, but only in those districts and only in proportion to the number of black students. The notion that black teachers should only be hired to the extent that there are black students seems such an accepted local practice that the District Judge in this case explained away the "undeniably meager" number of black teachers in Hazelwood by noting that "it has kept pace with the small but steadily increasing black enrollment in the district." *United States* v. *Hazelwood School District*, 392 F.Supp. 1276, 1787-8 (E.D. Mo. 1975).[8]

It should be noted that the distribution of black faculty is not a result of distance from the heavily black city of St. Louis. Four of the five districts with no black faculty in 1972 are adjacent to St. Louis; in 1969, of the 9 adjacent districts, 6 had no black teachers at all.[9] Similarly, 4

[8] Another judge in the same district took the same erroneous position in *United States* v. *School District of City of Jennings*, 399 F.Supp. 322, 328 (E.D. Mo. 1975), rev'd 539 F.2d 655 (8th Cir. 1976).

[9] Hazelwood, Jennings, Riverview Gardens, Hancock, Afton, Bayless, and Mehville.

districts[10] with faculties from 0.09% to 8.0% black adjoin 88.2% black Kinloch. None of the districts, with the exception of St. Louis, appear to hire a substantial portion of their teachers from among their own residents.[11]

Hazelwood is the second largest school district in St. Louis County, after St. Louis City. Between the formation of the district in 1950 and the 1968-69 school year the Hazelwood faculty rose from 27 teachers to over 900 teachers; every one of the teachers hired in these years was white. In 1972 Hazelwood had only 12 black teachers out of a faculty of 1,230, or less than 1%.[12] Hazelwood has a common boundary with St. Louis City, and the bulk of the district is adjacent to the St. Louis municipal airport, Lambert Field. The northern area of St. Louis which is closest to Hazelwood is the portion of the city with the greatest concentration of blacks. The Hazelwood School District includes the city of Black Jack, which was held to have deliberately engaged in practices to prevent blacks from moving into the area in *United States* v. *City of Black Jack,* 508 F.2d 1179 (8th Cir. 1974) *cert. denied,* 422 U.S. 1042 (1975).

The government commenced this action on August 10, 1973, alleging purposeful racial discrimination in the hiring of teachers, including application of different standards to black and white applicants.[13] The action was tried as a case of alleged deliberate discrimination. Counsel for the

[10] Patonville, Ritenour, Ferguson, Berkeley.

[11] Hazelwood, the largest of the districts outside of St. Louis City, hires about 7% of its faculty from among applicants residing in the district. *United States* v. *Hazelwood School District,* 534 F.2d 805, 811-12, n.7 (8th Cir. 1976).

[12] Plaintiff's Exhibit 54; 534 F.2d 805, 809.

[13] App. 4.

United States, in his opening statement, detailed the claim which the plaintiffs would seek to prove.

> The defendants' present racially discriminatory policy have their origin in Hazelwood's deliberate refusal to hire qualified blacks from the district's inception in 1951. . . . We will present testimony, largely by depositions, and answers to interrogatories which will show that the absence of black professional employees does not result from chance but is the result of purpose. Further, we will show that the Hazelwood District has deliberately continued employment practices which limit the number of black applicants.[14]

In its post-trial memorandum the government also urged that Hazelwood had deliberately discriminated against blacks.[15]

The district court rejected the government's contention that Hazelwood had engaged in racial discrimination, *United States* v. *Hazelwood School District,* 392 F.Supp. 1276, 1286-89 (E.D. Mo. 1975); the court of appeals reversed. 534 F.2d 805 (8th Cir. 1976). The Eighth Circuit concluded that the United States had established that Hazelwood engaged in deliberate discrimination, and rested its conclusion, *inter alia,* on evidence indicating that the white principals and supervisors, permitted to choose among applicants with a standardless discretion, had intentionally rejected blacks because of their race, 534 F.2d at 813, and that at least 16 fully qualified black applicants had been rejected in favor of less or no better qualified whites. 534 F.2d at 814-819. The court of appeals' opinion

[14] Transcript of March 25, 1974, pp. 7-8.

[15] Memorandum In Support of Plaintiff's Proposed Findings of Fact and Conclusions of Law and Proposed Order, pp. 2-5; Plaintiff's Proposed Findings of Fact and Conclusions of Law, pp. 100-101, 114, 118.

leaves no serious doubt that its finding was one of purposeful discrimination. With regard to the practice of according interviewers standardless discretion, the court stressed "[i]n our view, it is more than mere coincidence that the use of such procedures produced only a few black teachers," 534 F.2d at 812, and that these practices were "susceptible to discrimination." 534 F.2d at 813. The court went out of its way to explain how the defendants could have known the race of black victims who were not interviewed, such knowledge being an essential element to a showing of intent. See *Jefferson* v. *Hackney,* 406 U.S. 535 (1972). Finally the court explained that the small number of blacks hired, together with the use of subjective standards allowing a substantial opportunity for discrimination and other evidence, established a "prima facie case of discrimination," 534 F.2d at 813. This is a phrase which, in the context of this case, can only be understood as meaning a prima facie case of intentional discrimination.

Although all of this seems to have been understood below, petitioners in this Court urge that the Eighth Circuit decision was founded entirely on a finding of discriminatory effect. Proceeding from this misunderstanding, petitioners understandably find incomprehensible the Title VII effect rule as here applied,[16] the court of appeals' analysis of the evidence,[17] and the remedy ordered by the Eighth Circuit.[18] We believe that the decision below, properly understood as an intent case, presents neither the legal and factual difficulties pressed by petitioners nor the question regarding the constitutionality of Title VII which petitioners urge this Court to decide.

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[16] Brief for Petitioners, pp. 18-43.

[17] Id., pp. 44-60.

[18] Id., pp. 18-25.

II.

The Findings of Discrimination Below

When this case was tried in the district court in 1974, and when it was heard in the court of appeals in 1975, the defendants presented a single, consistent, though ultimately unpersuasive defense—that few blacks were hired by Hazelwood because the principals and other interviewers picked the best qualified applicants, and the vast majority of the best qualified applicants were white.[19] In this Court defendants have retained new counsel who, on examining a cold record, have advanced several entirely new assertions of fact as to what happened in Hazelwood, and to some extent St. Louis, in the years prior to trial. None of the numerous school board employees who testified, either at trial or by deposition, ever presented the explanation now urged by counsel for Petitioners in Part II of their brief. This theory was never presented to either court below. Under the circumstances we doubt that such new theories of fact can be asserted at this late date; we find unfair petitioners' complaint that the court of appeals "ignored" arguments and theories never there presented, and we believe the United States cannot reasonably be required to have rebutted at trial in 1974 a hypothetical defense first asserted by counsel for defendants in this Court in 1977.

Defendants' primary factual explanation in this Court is that very few blacks were hired in 1972-74 because very

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[19] We have lodged with the court copies of the defendants' opening statement at trial, the Defendants' Proposed Findings of Fact and Conclusions of Law, the Defendants' Brief and Memorandum In Support of Its Proposed Findings of Fact and Conclusions of Law, the Brief for Appellants in the Eighth Circuit, and the Petition for Rehearing the Court of Appeals.

few applied for positions at Hazelwood; assuming that no more than 60 applied during this period they urge that the proportion of black applicants hired was thus several times higher than that of white applicants. Brief for Petitioners, pp. 8, 10, 44-48. While the court of appeals below correctly held that the government made out a prima facie case of discrimination by showing the great disparity between the number of black teachers in Hazelwood and those in the surrounding county from which it drew over 70% of its new employees, 534 F.2d at 811-12, n. 7, defendants' evidence in no way rebutted that prima facie case. Defendants might have attempted to do so, for example, by establishing by direct and credible evidence both that (a) the proportion of blacks among applicants was substantially lower than the proportion of blacks in the labor market, and comparable to or lower than Hazelwood's hire rate, and (b) the small number of black applicants was not due to past recruiting practices, employment discrimination, or other non-neutral factors.[20]

With regard to the number of black applicants, counsel for defendants rely exclusively on the assumption that the

[20] See *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 449 (7th Cir. 1976); *Senter* v. *General Motors Corp.*, 532 F.2d 511, 526-28 (6th Cir.), *cert. denied*, 50 L.Ed. 2d 150 (1976); *United States* v. *Chesapeake & Ohio Ry. Co.*, 471 F.2d 582, 586 (4th Cir. 1972); *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 358 (5th Cir. 1972); *United States* v. *Carpenters Local 169*, 457 F.2d 210, 214 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972); *United States* v. *Hayes Int'l Corp.*, 456 F.2d 112, 120 (5th Cir. 1972); *United States* v. *Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); *Jones* v. *Lee Way Motor Freight Lines*, 431 F.2d 245, 247 (10th Cir. 1970), *cert. denied*, 410 U.S. 954 (1971). We believe that the taint need not be intentional. A policy against active recruiting, if it leads to a disproportionately white applicant flow, must, like a particular recruiting policy with that effect, or a test, be justified by business necessity. No such showing was made here, e.g., as to why defendants had never recruited at the predominantly black Harris Teachers College less than 10 miles from Hazelwood.

approximately 54 black applicants identified by the government for the years 1971-73 were the entire pool of such applicants, or close to it. In prefacing the government's case at trial, however, counsel for the United States expressly warned that the black applicants whom it would discuss were at best a fraction of the total:

> In view of the district's actions severely restricting the pool of available qualified black applicants and its practice of destroying application files after one year, it has not been possible to obtain facts on all or probably most black applicants to the district.
>
> However, we have been able to locate and identify at least fifty or sixty black applicants for 1972 and 1973 and 1973 and 1974 who, the evidence will show, applied for positions for which there were vacancies and that Hazelwood consistently hired white applicants either less or no better qualified for the vacancies.[21]

The government was able to identify only a small number of the black applicants because it was able to locate them only by sending FBI agents to interview applicants thought to be black. Defendants never suggested below that this group of 54 constituted all or most of the black applicants, never made below the calculations from this figure which lead them to assert a high proportion of black applicants were hired,[22] and cannot reasonably complain that the court of appeals "ignored" this "fact".[23] Even if this issue had been raised below, the government data did not purport to be a substantial portion of the total black applicants, and could not be so considered. Defendants,

[21] Transcript of March 25, 1974, p. 9.

[22] Brief for Petitioners, pp. 47-48.

[23] Id., pp. 44.

on the other hand, had ready access to far more direct and probative evidence as to the number of black applicants; the principals and supervisors who did the interviewing could by their testimony, based on personal knowledge, have offered significant proof as to what portion of the persons interviewed were black. Such testimony would have been of particular importance since the government contended that a significant portion of the discriminatory screening out of blacks occurred at the interview stage. Had there been such valuable evidence in the possession of the defendants, it would certainly have been introduced at trial.[24]

Defendants also offered no evidence to establish that a low level of black applicants, if it existed, was not tainted by present or past discriminatory practices. Defendants' counsel urges in this Court that there were only 54 black applicants in 1971-73, compared to a total of 7,800 applicants those three years.[25] If this were indeed the case, blacks would have accounted for less than 0.7% of all applicants for positions at Hazelwood, even though blacks were 15% of the teachers in St. Louis County, from which most of Hazelwood's new employees came. One third of Hazelwood's new employees come from St. Louis City, whose teachers are over 54% black and whose population is over 40% black.[26] The applicant flow asserted by defendant would mean, *inter alia,* that despite the thousands of black teachers in St. Louis virtually all the teachers in

[24] See *Pierre* v. *Louisiana,* 306 U.S. 354, 361-62 (1939).

[25] Brief for Petitioners, pp. 47-48. The total applicant number doubtless includes some duplications of whites who submitted or renewed their applications. There is no explanation as to how they were determined. Petitioners, also, do not in their calculations discount black teachers who were only hired after this suit was brought or include those black applicants who applied in more than one year. See 392 F. Supp. 1285. (Vina Jones).

[26] Statistical Abstract of the United States, 1973, p. 891.

the city seeking jobs in Hazelwood were white. Such a peculiar pattern of behavior would call for an evidentiary explanation, particularly in view of the fact that Hazelwood's past failure to hire blacks must have been common knowledge and is likely to have deterred black applicants. While a variety of other possible theories, most involving continuing effects of past discrimination, could be hypothesized to explain the alleged paucity of black applicants, the burden was on defendants to provide evidence to establish a neutral explanation, and that burden was neither met nor shouldered below. Certainly the United States cannot be faulted, as defendants seek to do in this Court, for having "failed" to show in the District Court in 1974 that there was some discriminatory origin of a small number of black applicants first asserted to exist in this Court several years later.

Defendants offer a related assertion of fact with regard to its failure to hire *any* blacks prior to 1969—that virtually no blacks applied during this period.[27] No employee of the defendant school board who testified, most of whose experience at Hazelwood began prior to 1969, stated there was any shortage of black applicants then. This era, moreover, was one in which Hazelwood was engaged in active recruiting, and thus the racial composition of the applicant group was directly under its control.[28] If there were a shortage of black applicants in this period it was certainly due to the fact that Hazelwood's recruiting was almost entirely limited to all-white or virtually all-white colleges, and that while the district recruited from schools in distant states it never sought applicants from the predominantly black Harris Teachers College less than 10 miles away in downtown St. Louis. Here again, the burden was

[27] Brief for Petitioners, pp. 58-59.

[28] 534 F.2d at 808-09.

on Hazelwood to offer evidence establishing both a low number of black applicants, and the absence of taint, and it did neither.

Finally defendants attack the inclusion of St. Louis City in the labor market with which Hazelwood's meager number of blacks was compared. The court below noted that approximately one third of the teachers hired by Hazelwood lived in St. Louis City when first hired by defendants, and Hazelwood does not deny that about half of all the teachers in St. Louis are black. 534 F.2d at 812, n. 7. Defendants did not raise this issue in the district court, a matter of some importance since it also involves factual assumptions not supported by the record; defendants' reference in their court of appeals brief to the inclusion of St. Louis, if an argument at all, certainly is not the contention urged here.[29]

(a) Defendants appear to argue that the large number of presently employed black teachers in St. Louis is unimportant because that figure is inflated by the City's active recruitment of black teachers from outside the state, whereas those hired from St. Louis by Hazelwood were persons who merely lived there but were not yet employed as teachers, presumable mostly new college graduates. This contention rests entirely on the assumption that Hazelwood is not hiring employed teachers away from the City of St.

[29] Brief of Appellees, p. 18:

"It is ironical that the Government would introduce Dr. Young as a witness to support its contentions. His further testimony indicated that his office maintained files with complete knowledge of the race of the applicants. Further, he stated that the Board of Education deliberately tried to maintain a ratio of 50% black and 50% white teachers. That in the last three years, the St. Louis Board of Education has hired approximately 55% black teachers. This is in the face of the Government's argument that a 16% teacher ratio should be maintained in the St. Louis area."

Louis and that few of the new teachers in St. Louis are black; these factual allegations were never made or proved below and are not supported by the record.

(b) Defendants seem to argue, in the alternative, that it cannot find many black teachers because St. Louis is getting them all, or, at least, St. Louis is getting all the black teachers who live in St. Louis. This factual claim, however, was never made or approved below, and no evidence was introduced, and no new factual assertion is made here, to explain why Hazelwood would always lose to St. Louis in the competition for blacks, why black college graduates would prefer to teach in St. Louis, or why black teachers in the St. Louis system would be less interested in transferring to Hazelwood than white St. Louis teachers.

(c) The government argued and the court of appeals found that the 15% black teacher ratio in St. Louis County was a reasonable standard against which to measure Hazelwood. The 15% standard was based on the 1970 census when blacks constituted about 40% of the St. Louis City teachers.[30] In arguing that the St. Louis figures are in some sense inflated defendants rely entirely on a statement made by a St. Louis school official in March of 1974 that "in the past few years" the city had shaped its recruiting and hiring policies so as to maintain an equal number of black and white teachers in the system.[31] Given the temporal limitation in the testimony, however, there is no reason to believe that this "recent" policy was in effect prior to 1970 or was responsible for the 1970 St. Louis figure, which was well under 50% black and which is the figure used by the court of appeals. Moreover, the testimony relied on does not indicate whether the recruiting

[30] 534 F.2d 811.

[31] App. 92-94.

and hiring are tilted to increase the number of blacks over what would otherwise have been hired, or to increase the number of whites. Since black teachers had risen to 54.5% of the St. Louis City school system by 1972-73,[32] maintaining a 50% white and black proportion would have required favortism for white applicants, not blacks.

Defendants in the trial court failed to introduce evidence which adequately rebutted the inference of purposeful discrimination raised by the government's evidence which showed a history of discriminatory practices, a hiring procedure susceptible to racial abuse, a revealing statistical disparity, and the clear disparate treatment of qualified black applicants who were never interviewed or hired. Petitioners' attempt to rebut that inference at this point with a conjectured statistical analysis cannot stand.

III.

Title VII's Prohibition Against Unnecessary Practices With Discriminatory Effects Is Constitutional

Petitioners urge that "no decision of the Court . . . holds," that "mere disparate treatment of blacks (or others entitled to the protection of Title VII) in employment practices suffices to make out a case under Title VII," and that both *General Electric Co.* v. *Gilbert,* 97 S.Ct. 401, 408-09 (1976), and *Washington* v. *Davis,* 426 U.S. 229, 246-47 ((1976), erred in suggesting that this matter was decided earlier. They insist both *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971) and *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975) were, insofar as they dealt with testing and educational requirements, really intent cases, and that the tests and requirements were there disapproved be-

[32] Plaintiff's Exhibit 54.

cause they froze blacks into positions to which they had been assigned on the basis of race. Brief for Petitioners, p. 41, n. 13. In *Griggs,* however, the test was only used for employees hired after 1965, when the district court found there was no intentional discrimination in assignment, 401 U.S. at 427, and this Court's disapproval of the company's education requirement was not based merely upon its effect on, or limited to, pre-1965 hires, but applied to all uses of such requirements "that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." 401 U.S. at 432. Similarly, this Court's decision in *Albemarle* was not limited to the application of the Beta and Wonderlic tests to blacks previously assigned to low skill lines of progression and departments on the basis of race, but extended to all uses of those tests. 422 U.S. at 425-436.

Petitioners suggest, in the alternative, that Congress never intended to extend this aspect of Title VII to state and local governments, emphasizing that the legislative history of the 1972 amendments noted that racial discrimination by state and local governments was already prohibited by the Fourteenth Amendment. Brief of Petitioners, pp. 38-41. The legislative history cited by petitioners, however, does not assert that the substantive rights under Title VII are identical to those under the Equal Protection Clause. The statutory language of Title VII draws no distinction whatever between the employment practices prohibited on the part of private and public employers. Both the House and Senate Reports, in explaining the application of Title VII to state and local governments, expressly noted the need to stop the use of "invalid selection techniques," [33] i.e. tests and educational requirements that

[33] S. Rep. No. 92-415, 92nd Cong., 1st Sess., 10 (1971); H.R. Rep. No. 92-238, 92nd Cong., 1st Sess. 17 (1971).

are not, in fact, job-related; so did Congressman Perkins,[34] the House floor manager and Senator Williams,[35] the Senate floor leader.

Third, petitioners suggest that the effect rule is unconstitutional as applied to any employer because it requires that applicants be hired on the basis of race. Brief for Petitioners, p. 22. *Griggs* and its progeny do not require employers to hire blacks in exactly the proportion of black applicants or residents or members of the work force, or to abandon any selection procedure which would yield any other proportion; a test or other requirement that has an adverse effect on a minority group may nonetheless be used if the employer can demonstrate that the standard is job-related and that no alternative selection procedures exist without that effect. *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 429-435. It is, of course, true that Title VII encourages an employer to inquire whether its selection procedures have such an adverse racial impact, but such a salutary undertaking is well within the benign considerations of race permitted, and at times required, by the Fourteenth Amendment. *United Jewish Organizations of Williamsburg* v. *Carey*, 45 U.S.L.W. 4221 (1977).

Title VII, insofar as it prohibits certain discriminatory effects, was clearly within the power of Congress to enact under Section 5 of the Fourteenth Amendment, Section 2 of the Thirteenth Amendment, and the Commerce Clause. There is no area of federal-state relations in which an extension of overriding federal control is more firmly established, in our history and in the Constitution, than that of discrimination. The fundamental constitutional and

[34] Legislative History of the Equal Employment Opportunity Act of 1972 (hereinafter cited as "Legislative History"), 196 (1972).

[35] Id., p. 1114.

political theory of the abolitionists who brought about the end of slavery, and who, in Congress, drafted the Thirteenth, Fourteenth, and Fifteenth Amendments and the Civil Rights Acts of 1866 and 1871, was that eradicating discrimination in and by states and localities was a responsibility which the national government could and should assume.[36] No form of discrimination is closer to that which the Thirteenth Amendment forbade, and no form of discrimination is more clearly a "badge of slavery", than racial discrimination in employment. Moreover, the historical evidence indicates that the intent of the framers was for Congress, not merely the courts, to play the major role in determining what legislation would best enforce the protections of the Amendments.[36a]

Title VII is not, as petitioners suggest, a wide ranging untried and burdensome new substantive standard far from the clear meaning of the Equal Protection Clause. The effect rule under Title VII, as elaborated by *Griggs* and its progeny, is a precise prohibition against a relatively narrow class of hiring and promotion standards—particularly tests and educational, height and weight requirements—which are not related to the particular job at issue. This validation defense assures that Title VII will not deprive any employer, private or public, of a personnel device actually necessary to its operation, and thus places no significant burden on an employer.[37] Congress

[36] See generally tenBroek, Equal Under Law (1951).

[36a] Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 63-64 (1955). See *Katzenbach* v. *Morgan*, 384 U.S. 641, 648-51 (1966).

[37] The burdens complained of at pp. 21-22 of the Brief for Petitioners are the normal incidents of a finding of discrimination and have nothing to do with the effect rule as such.

Petitioners also appear to misunderstand the remedy ordered by the court of appeals in this case which makes clear that it was remedying purposeful discrimination by limiting the potential for

only applied this requirement to state and local governments after 7 years of experience in the private sector demonstrated that the effect rule was both necessary and workable.

Katzenbach v. *Morgan*, 384 U.S. 641 (1966) and *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) make clear that Congress may, in appropriate cases, prohibit under § 5 of the Fourteenth Amendment conduct not otherwise forbidden by the Amendment. Compare *Lassiter* v. *Northampton Election Board*, 360 U.S. 45 (1959). Congressional action establishing substantive standards under Section 5 is most clearly warranted in the penumbra of the Amendment, where either the statutory rule has historically or reasonably been regarded as the constitutional rule—even though ultimately held not to be so—or the facts which Congress has declared a statutory violation would have been significant evidence of a constitutional violation. Both circumstances are present here. That effect might be both necessary and sufficient to establish a constitutional violation was suggested by this Court as recently as *Palmer* v. *Thompson*, 403 U.S. 217 (1971), and both *Washing-*

racial abuse. Their claim that the court interfered excessively with its necessary operations and ordered racially discriminatory hiring is just unfounded. This is shown by what the Court did not do as well as by what it did. With the exception of the 16 applicants who were discriminated against, the court did not order Hazelwood to hire any black teachers. Neither did it order them to establish any particular set of standards or criteria or to engage in any recruiting.

The court's remedy allows Hazelwood to structure its hiring procedures in any way that it chooses and to establish whatever criteria it wants to apply. The court's order interferes with Hazelwood's operations only by requiring it not to discriminate in the operation of those procedures and the application of those criteria. Reporting to the Justice Department and maintaining a record of the fate of black applicants make it possible to check whether these standards have been applied in a fair and non-discriminatory manner.

ton v. *Davis*, 426 U.S. 229, 241 (1976) and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 45 U.S.L.W. 4073, 4078 (1977) indicate that the extent to which a disputed action has a discriminatory effect is often the most important evidence of the underlying intent.

As a matter of purely constitutional law the use by a state or local government of a non job-related selection procedure with an adverse impact on minorities would, under a variety of circumstances, be impermissible. In a significant number of cases in which an employer uses a test or other device which excludes disproportionate numbers of blacks or other minorities, but which is not in fact job related, the employer is intentionally employing that procedure to discriminate. There are doubtless other cases in which such procedures, however well intentioned, have the effect of locking minority employees into jobs to which they were initially assigned on the basis of race. Since some selection procedures have an adverse impact on minorities because of inadequate education, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971), and since that inadequate education is often itself due to past racial or other discrimination by state and local governments, *Gaston County* v. *United States*, 395 U.S. 285 (1969), the use of such procedures by a state or local government will involve a problem of past intentional discrimination not applicable to private employers. We believe that Congress, rather than requiring detailed proof that a selection procedure fell into one of these categories of unconstitutional action, could reasonably establish a simple rule prohibiting the use of such procedures if they were not job related. Title VII, viewed in this light, falls within the general rule that "the inclusion of a reasonable margin to insure effective enforcement will not put upon

a law, otherwise valid, the stamp of invalidity." *Euclid* v. *Ambler Realty,* 272 U.S. 365, 388-89 (1926).[37a] This rule clearly applies to the congressional Fourteenth Amendment enforcement power,[37b] which includes the power to prohibit as a preventive measure under Section 5 that which would not be prohibited by Section 1 of its own force. Compare *Katzenbach* v. *Morgan* and *Oregon* v. *Mitchell, supra,* with *Lassiter* v. *Northampton Election Board, supra.*

Title VII is also well within the power of Congress under the Commerce Clause. *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), established that Congress does not have the same unfettered control over state and local government activities affecting interstate commerce that it has over private businesses, and that a statute proper as to private industry may be invalidated if it interferes excessively with the "integral governmental functions" of states or cities. 426 U.S. at 851. The constitutionality of such legislation depends upon "the degree of intrusion upon the protected area of state sovereignty" and the extent to which its object is, as a legal or practical matter, an area of substantial federal interest. 426 U.S. at 852-53. The federal interest in protecting racial minorities is well

[37a] The Court in *Euclid* further stated that "such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation." *Id.*

[37b] See Orloski, *The Enforcement Clauses of the Civil War Amendments: A Repository of Legislative Power,* 49 St. John's L. Rev. 493, 506-507 (1975); Yackle, *The Burger Court, "State Action," and Congressional Enforcement of the Civil War Amendments,* 27 Ala. L. Rev. 479, 562-66 (1975); Cohen, *Congressional Power to Interpret Due Process and Equal Protection,* 27 Stan. L. Rev. 603, 613-16 (1975); Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments,* 74 Colum. L. Rev. 449, 505-10 (1974).

established in our constitutional system, and transcends the type of concern at issue in *National League of Cities.* Conformity with Title VII's effect rule, unlike the minimum wage in *National League of Cities,* will not impose any costs on complying jurisdictions. Since Title VII prohibits only selection practices which are not job related, compliance will not interfere with any legitimate state or local policies or practices and may well contribute significantly to the efficacy of their personnel methods.

Independent of its other constitutional bases for actions, Congress clearly could, and in this case intended to, require compliance with the effect rule of Title VII under its spending power. Senator Williams, the floor manager, explained at the outset of the Senate debate on extending Title VII to state and local employees this rationale and ground for congressional action:

> The Federal Government's interest in state and local government operations cannot be underestimated. There are approximately 10 million employees of state and local political subdivisions. The Federal Government alone will distribute more than $43 billion of its tax revenues to these levels in the next year . . .
>
> Mr. President, it is clear that with the expenditure of such sums comes the responsibility of making sure that the distribution and use of the funds is without discrimination. The failure to have adequate minority representation in those agencies of Government responsible for expending those funds is an element of this discrimination.[38]

Senator Williams then placed in the Congressional Record a lengthy memorandum detailing the various types of fed-

[38] Legislative History, pp. 1114-15.

eral aid being provided to state and local governments.[39] Senator Williams also placed in the record portions of a report of the United States Commission on Civil Rights urging federal action on this basis.[40] The Hazelwood School District is among the thousands of units of state and local government receiving such federal aid and in recent years has sought and accepted more than $500,000 annually in federal grants. Agencies accepting such funds are, as a consequence, subject to a host of federal statutes and regulations not remotely related to their constitutional duties, and Hazelwood, like the others, must accept such additional requirements.

IV.

The Remedy Afforded the 16 Victims of Discrimination

Petitioners devote 17 pages of their brief to an argument that the court of appeals erred in finding there was discrimination against the 16 black applicants to whom specific relief was awarded. Brief for Petitioners, pp. 61-77. Petitioners urge that, if the Court rejects their argument concerning the constitutionality of Title VII, the case nonetheless be "remanded for reconsideration of the alleged individual cases of discrimination." Id., p. 78. Petitioners candidly concede, however, that certiorari was purposely not sought with regard to this aspect of the Eighth Circuit's decision. Id., p. 62. Under these circumstances the Court can neither consider nor resolve the issues deliberately abandoned by petitioners.

[39] *Id.*, pp. 1138-50.

[40] *Id.*, 1123.

V.

Affirmative Action Is Required to Disestablish the Pattern of Racially Identifiable School Districts

As we noted *supra,* pp. 2-6, Missouri prior to 1954 mandated the assignment of teachers among St. Louis county school districts on the basis of race, and forbade the hiring of black teachers by Hazelwood and 22 other districts. The result of this *de jure* faculty segregation was that both the racial composition of student bodies, and which districts operated schools for black students at all, could be readily identified by the race of the faculty. Such a pattern of faculty hiring and assignments is among the practices which are forbidden by *Brown* and which the school officials involved are required to take steps to disestablish. *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969).

Even if Hazelwood abandoned in the early 1970's or earlier its past policy of hiring only whites, that would not be sufficient to satisfy its constitutional obligation under *Brown.* In *Green* v. *School Board of New Kent County,* 391 U.S. 430 (1968), this Court rejected the argument that a school board could meet its responsibilities with regard to student segregation by merely opening "the doors of the former 'white' school to Negro children," particularly since this placed the burden of desegregation on black parents and children who were required to take the initiative in disestablishing the dual system. 391 U.S. at 438, 441. *Green* charged the school boards with an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S. at 438. *Swann* v. *Charlotte-Mecklenburg,* 402 U.S. 1 (1971), made

clear that this means that, to the extent reasonably feasible, pupil assignments must be modified to disestablish any pattern of racially identifiable schools.

Swann also held that a similar obligation applied to faculties:

> Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown. 402 U.S. at 18.

There is no reason to distinguish the *de jure* restriction of black teachers to particular schools from the *de jure* allocation of black teachers among particular districts where, as here, those districts are adjacent or in reasonable proximity to each other. In the instant case there are 9 school districts with over 3,000 teachers adjacent to St. Louis City, all of which were forbidden by law to hire black teachers prior to 1954. These are precisely the circumstances in which *Swann* requires that affirmative action be taken by local officials to disestablish the pattern of racially identifiable school districts.[41]

The record clearly establishes that this was not done. As of 1972-73, 4 of the 9 adjacent school districts still had no black teachers, and 2 others, including Hazelwood, had 1% or less. The only districts with significant numbers of

[41] Since there are 9 such adjoining districts it is not necessary for the Court to consider whether the other 14 districts in the county have such a geographical proximity to St. Louis, Kinloch, or the new heavily black districts as to require similar affirmative action.

black teachers are those that have also acquired since 1954 substantial black populations. The simple system of racial identifiability that had existed in 1954, rather than withering away, had grown in sophistication and complexity, now indicating, not merely whether a district had black students, but also roughly how many. See pp. 4-5, *supra.*

The conduct of the Hazelwood officials in this case bears a striking resemblance to that disapproved in *Green.* Although the district claims to have had a nominal policy of non-discrimination since at least the early 1960's, no black teacher was hired until 1969, some 15 years after *Brown.* Since then the black faculty has remained at a token level in the school district. The critical hiring decisions, based on broad and unreviewed discretion, are made by principals and supervisors who, because of Hazelwood's past discrimination, are all white. The primary defense advanced by Hazelwood in this Court is that it has opened its doors to black teachers, but that very few teachers have applied. Hazelwood's conduct is the precise counterpart in the area of faculty segregation to the "freedom of choice" plan found wanting in *Green.* Such a passive approach, while not invalid *per se,* is only constitutionally acceptable where it in fact succeeds in disestablishing the pattern that arose under the practices forbidden by *Brown.* Here, as in *Green,* it has not succeeded.

Green and *Swann* thus provide a constitutional basis for requiring appropriate remedial action by Hazelwood regardless of whether the school district has engaged in active discrimination in recent years. This theory of the case was expressly advanced by the United States below.[42]

[42] App. 3, 4; Memorandum In Support of Plaintiff's Proposed Findings of Fact and Conclusions of Law and Proposed Order, pp. 6-7. This Memorandum urged that in view of Hazelwood's affirmative duty under *Green* "a late blooming racial neutrality on

The decision of the court of appeals can be affirmed on this ground alone, without reaching the Title VII issue, and should be affirmed on this ground even if the government's Title VII claim is not upheld.

We believe that, judged by the requirements of *Green*, as by those of Title VII, the remedy ordered by the court of appeals is seriously deficient. Hazelwood is directed to cease discrimination, to adopt more objective standards, and to make periodic reports. The only specific substantive relief ordered is the hiring of 16 particular victims of past discrimination, a number so small as to be insufficient to materially increase the proportion of black teachers at Hazelwood. Although the government, at trial, sought affirmative relief in the form of goals and timetables to increase the number of black teachers,[43] the issue of relief, however, was not briefed on appeal. With the exception of the 16 rejected blacks the Eighth Circuit's order is entirely prospective, and does not seek to redress the effects of past practices. We note, however, that the opinion of the court of appeals does not purport to limit the ability or duty of the district court to order whatever additional relief may be warranted by the circumstances.

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the part of District personnel in hiring decisions, even if it were present in this case, which we do not concede, would not be sufficient to establish absence of a violation."

[43] Memorandum In Support of Plaintiffs' Proposed Findings of Fact and Conclusions of Law and Proposed Order, pp. 10-13. The United States suggested as a goal that Hazelwood hire at least 1 black for every 3 whites until the Hazelwood Faculty reached 15% black. *Id.*, p. 12.

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be affirmed.

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